NTSB Order No.
EM-39

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 10th day of October 1974

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

CHARLES D. MOORE, Appellant.

Docket ME-32

OPINION AND ORDER

Appellant is seeking review of a decision of the Commandant affirming the revocation of his seaman's document under authority of 46 U.S.C. 239b.[1] In the prior action, appellant had appealed to the Commandant (Appeal No. 1971) from the initial decision of Administrative Law Judge Tilden H. Edwards, issued at the conclusion of a full evidentiary hearing.[2] Throughout these

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[1]46 U.S.C. 239b, in relevant part, provides that "The Secretary [of the Department in which the Coast Guard is operating] may--
...(b) take action, based on a hearing before a Coast Guard examiner, under hearing procedures prescribed by the Administrative Procedure Act, as amended, to revoke the seaman's document of--
(1) any person who, subsequent to July 15, 1954, and within ten years prior to the institution of the action, has been convicted in a court of record of a violation of the narcotic drug laws of the United States, the District of Columbia, or any State or Territory of the United States, the revocation to be subject to the convictions becoming final..."
The authority to take revocation actions under this statute devolves on the Commandant by delegation from the Secretary of Transportation. 49 CFR 1.46(b); see Commandant v. Snider, 1 N.T.S.B. 2177(1969).

[2]Copies of the decision of the Commandant and the law judge (acting as a "hearing examiner") are attached hereto. The title of hearing examiner was changed to administrative law judge by rulemaking action of the Civil Service Commission. 5 CFR 930;

proceedings, appellant has been represented by his own counsel.

The law judge found that appellant was convicted on March 31, 1972, by a plea of guilty, of violation section 115.30 of the California Health and Safety Code; that said section 11530.5 was a narcotic drug law of that State; that appellant's conviction was in a court of record, namely, the Superior Court of California, for the County of Alameda; and that he was fined $500 and placed on probation for 3 years. The law judge thereupon ordered the revocation of appellant's merchant mariner's document (No. Z-712991-D1), acting in compliance with Coast Guard regulation 46 CFR 137.03-10(a), which directs that the law judge " shall" enter such sanction upon "proof of a narcotics conviction by a court of record as required by Title 46, United States Code, section 239b..."

Two exhibits were offered in evidence to meet this requirement of proof. They are certified copies of the Superior Court's judgement and the criminal information related thereto. The portion of the judgement record which is germane recites that appellant was convicted on the dated in question of "a felony, to wit: a violation of section 11530.5 of the Health and Safety Code, a lesser and included offense within the offense as charged in the first count of the Information..." The information shows that appellant was charged in the first count with violation of section 11531 of the California Code "in that on or about the 6th day of March 1971, in the County of Alameda, State of California, he unlawfully transported, sold, furnished and gave away a narcotic, to wit: marijuana." The documents were admitted in evidence without objection, and it was conceded that appellant "was guilty as charged" but had "negotiated [a] plea of guilty to one of possession of marijuana for sale..." (Tr. 16). Appellant's counsel offered no evidence at the hearing, relying instead on the assertion of several mitigating factors in oral argument.

In appellant's brief on appeal, the principal contentions are that the aforesaid regulations, calling for mandatory revocation, violates due process and that his sanction is disproportionate to the offense for which he was convicted. A further contention is advanced that the prior decisions have misconstrued the law and the regulations. Counsel for the Commandant has not filed a reply brief.[3]

Fed. Reg. 16877, August 19, 1972.

[3]The objection of Commandant's counsel to the late filling of the notice of appeal herein is rejected. Its untimeliness was explained satisfactorily by appellant's counsel at the time of

Upon consideration of appellant's brief and the entire record, we conclude that the findings of the law judge are supported by reliable, probative, and substantial evidence. In addition to our further findings herein, we adopt the law judge's findings as our own. Moreover, we agree that the sanction is warranted under 46 U.S.C. 239b.

The findings of the Commandant, reflecting that appellant was convicted of the offense charged in the information, are reversed and set aside. Based on the undisputed evidence of record, appellant was convicted, under section 11530.5, of unlawful possession of marijuana for sale.[4] The fact that this was a lesser, included offense is not determinative. It was nonetheless a serious crime involving drug trafficking, classified as a felony under California law.[5] As we construe 46 U.S.C. 239b, it clearly intends the revocation action to be taken against seaman convicted of a drug violation of this gravity, and particularly of this nature.

Appellant's contentions on appeal are solely concerned with the liberalized policy of Coast Guard regulation 46 CFR 137.03-4, affecting seamen charged with misconduct during maritime employment, under 46 U.S.C. 239(g), for commission of offenses involving marijuana. Since the law judge has discretion thereunder, in certain cases, to enter an order less than revocation, appellant argues that he is also entitled to a lesser sanction. Otherwise, he maintains, he is not afforded "equal protection" as required by due process.

The crux of appellant's is his claim that other seamen may receive a reduced sanction, if charged under 46 U.S.C. 239(g), for committing the same offense as that for which he was convicted. This ignores the gravity of his crime as a comparison factor. It also misconstrues the regulation offered for comparison.

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filling.

[4]40 Cal. Code §11530.5. West's Annotated California Codes.

[5]Id., §11530.5 A cumulative pocket supplement (1973) indicates that sections 11504 and 11530.5 were repealed and incorporated as sections 11356 and 11359, respectively, in a new Uniform Controlled Substances Act by the California legislature in 1972. No issue in this connection is raised by appellant, however, and he has at no stage challenged the finality of his conviction under section 11530.5.

46 CFR 137.03-4 provides initially that: "Whenever a charge of misconduct by virtue of the possession, use, sale or association with narcotic drugs, including marijuana, or dangerous drugs is found proved, the administrative law judge shall enter an order revoking all license, certificates and documents held by such a person." The authority to enter a lesser sanction ia then vested in the law judge but restricted to "those cases involving marijuana, where [he] is satisfied that the use, possession or association, was the result of experimentation...and [the offending seaman] has submitted satisfactory evidence that such use will not recur..."[6] Clearly, the sale of marijuana is proscribed as a revocable offense in the first provision of this regulation and is not included among the marijuana offenses, in the second provision, for which a lesser sanction may be considered by the law judge.

Moreover, appellant presented no evidence in mitigating. His mere assertions that he was an experimental user of marijuana and had ceased to use it (Tr. 17) lacked probative force in assuring that the offense for which he was convicted, in addition to his admitted prior use of the drug, would not be repeated. It is seen, under these circumstances, that the provision in 46 CFR 137.03-4 allowing for a reduced sanction would in no way be applicable to this appellant. His due process contention is unfounded and thus lacks validity. Furthermore, we have no hesitancy in finding that the sanction was commensurate with his offense, since the broad purpose of 46 U.S.C. 239b indicated by legislative history "is to prevent narcotics users or traffickers in narcotics[7] from securing employment on merchant ships."[8]

The Commandant's decision places undue emphasis on the statute's sole use of the word "revoke" in expressing the sanctioning power. This power, however, is granted in a permissive sense that "the Secretary [and the Commandant, by delegation] may...take action...to revoke..." If Congress had intended the mandatory application of the statute in all cases wherein seamen have been convicted of marijuana offense, no matter how petty, it could simply have substituted the word "shall" for the word "may"

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[6]Coincident with the issuance of this regulation on October 20, 1970, 46 CFR 137.03-3 was revised to eliminate the requirement of former subsection (a) thereof that revocation orders be entered upon proof of any and all seaman's offenses involving marijuana.

[7]The term "narcotic drug," as used in the statute, includes marijuana. 46 U.S.C. 239a (a)

[8]H.R. Rep. No. 1559, 83rd Cong., 2d Sess. (1954).

Not having done so, the fair implication to be derived is that such authority was intended to be exercised as a matter of discretion. Although we disagree with the construction of the statute in this and several other respects by the Commandant, we nonetheless adhere to our prior determination herein. The record in this case contains only the proof of appellant's felony conviction for unlawful possession of marijuana for sale, and he has adduced no facts for consideration of any other action save revocation of his seaman's document under 46 U.S.C. 239b. As in Commandant v. Stuart,[9] we further find, in this instance, that "the underlying policy of the statute necessitate this action...to avoid the risks of appellant's subsequent involvement with marijuana offenses when offenses when serving aboard merchant vessels, to the detriment of shipboard safety, morale, and discipline."

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The Commandant's order affirming the revocation of appellant's seaman's document by the law judge, under authority of 46 U.S.C. 239b, be and it hereby is affirmed.

REED, Chairman, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order. McADAMS, Member, did not participate.

(SEAL)

[9]NTSB Order EM-31, adopted October 31, 1973.